

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

KAREN D. MCQUEEN,)	
)	
Plaintiff,)	
)	
v.)	1:13CV421
)	
CAROLYN W. COLVIN,)	
Acting Commissioner of)	
Social Security,)	
)	
Defendant.)	

MEMORANDUM OPINION AND ORDER

OSTEEN, JR., District Judge

Plaintiff, Karen D. McQueen, brought this action pursuant to Sections 205(g) and 1631(c)(3) of the Social Security Act (the "Act"), codified as amended at 42 U.S.C. §§ 405(g), 1383(c)(3), to obtain review of a final decision of the Commissioner of Social Security denying her claims for Disability Insurance Benefits ("DIB") and Supplemental Security Income ("SSI") under Titles II and XVI of the Act. The court has before it the certified administrative record and cross-motions for judgment.

I. BACKGROUND

Plaintiff filed applications for DIB and SSI on August 27, 2009, alleging a disability onset date of June 15, 2009, that was later amended to October 1, 2009. (Tr. at 9, 26, 134-45

(noting that she applied for SSI on September 8, 2009.)¹ The applications were denied initially and again upon reconsideration. (Id. at 55-67, 71-89.) Plaintiff then requested a hearing before an Administrative Law Judge ("ALJ"). (Id. at 92-106.) Plaintiff, her attorney, and a vocational expert ("VE") attended the May 12, 2011 hearing. (Id. at 22-54.) On July 14, 2011, the ALJ determined that Plaintiff was not disabled under the Act. (Id. at 9-19.)

Specifically, the ALJ concluded that (1) Plaintiff had not worked during the relevant period; (2) her severe impairments were bursitis of the right shoulder and thumb, chronic obstructive pulmonary disorder, degenerative disc disease of the cervical and lumbar spine with mild disc bulge, depression, bipolar disorder, and anxiety; (3) she did not meet or equal a listed impairment; (4) she could perform a full range of light work but should only occasionally climb stairs or ramps, should only occasionally bend, balance, stoop, crawl, or crouch, should never climb ladders or ropes, should avoid hazardous machinery or exposure to fumes, should only occasionally reach overhead, and should only perform simple, repetitive, and routine tasks,

¹ Transcript citations refer to the Administrative Transcript of Record filed manually with the Commissioner's Answer. (Doc. 7.)

with only occasional contact with others; and (5) she was unable to perform any past relevant work but there were other jobs she could perform. (Id. at 11-19.) Plaintiff requested that the Appeals Council review the ALJ's decision and, on April 9, 2013, the Appeals Council denied Plaintiff's request for review, making the ALJ's determination the Commissioner's final decision for purposes of review. (Id. at 1-4.)

II. LEGAL STANDARD

Federal law authorizes judicial review of the Commissioner's denial of social security benefits. 42 U.S.C. § 405(g); Hines v. Barnhart, 453 F.3d 559, 561 (4th Cir. 2006). However, the scope of review of such a decision is "extremely limited." Frady v. Harris, 646 F.2d 143, 144 (4th Cir. 1981). "The courts are not to try the case de novo." Oppenheim v. Finch, 495 F.2d 396, 397 (4th Cir. 1974). Instead, "[a reviewing court] must uphold the factual findings of the [ALJ] if they are supported by substantial evidence and were reached through application of the correct legal standard." Hancock v. Astrue, 667 F.3d 470, 472 (4th Cir. 2012) (citation omitted).

"Substantial evidence means 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" Hunter v. Sullivan, 993 F.2d 31, 34 (4th Cir. 1993) (quoting Richardson v. Perales, 402 U.S. 389, 390 (1971)). "[I]t consists of more than a mere scintilla of evidence but may

be somewhat less than a preponderance." Mastro v. Apfel, 270 F.3d 171, 176 (4th Cir. 2001) (citation omitted). "If there is evidence to justify a refusal to direct a verdict were the case before a jury, then there is substantial evidence." Hunter, 993 F.2d at 34 (internal quotation marks and citation omitted).

"In reviewing for substantial evidence, [the court should not] undertake to re-weigh conflicting evidence, make credibility determinations, or substitute [its] judgment for that of the [ALJ]." Mastro, 270 F.3d at 176 (citation omitted). "Where conflicting evidence allows reasonable minds to differ as to whether a claimant is disabled, the responsibility for that decision falls on the [ALJ]." Hancock, 667 F.3d at 472 (citation omitted).

In undertaking this limited review, this court notes that "[a] claimant for disability benefits bears the burden of proving a disability." Hall v. Harris, 658 F.2d 260, 264 (4th Cir. 1981) (citations omitted). In this context, "disability" means the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months" Id. (quoting 42 U.S.C. § 423(d)(1)(A)).

"The Commissioner uses a five-step process to evaluate disability claims." Hancock, 667 F.3d at 472 (citing 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4)). "Under this process, the Commissioner asks, in sequence, whether the claimant: (1) worked during the alleged period of disability; (2) had a severe impairment; (3) had an impairment that met or equaled the requirements of a listed impairment; (4) could return to her past relevant work; and (5) if not, could perform any other work in the national economy." Id.

A finding adverse to the claimant at any of several points in this five-step inquiry forecloses a disability designation and ends the inquiry. For example, "[t]he first step determines whether the claimant is engaged in 'substantial gainful activity.' If the claimant is working, benefits are denied. The second step determines if the claimant is 'severely' disabled. If not, benefits are denied." Bennett v. Sullivan, 917 F.2d 157, 159 (4th Cir. 1990).

On the other hand, if a claimant carries his or her burden at the first two steps, and if the claimant's impairment meets or equals a listed impairment at step three, "the [claimant] is disabled." Mastro, 270 F.3d at 177. Alternatively, if a claimant clears steps one and two, but falters at step three, i.e., "[i]f a claimant's impairment is not sufficiently severe to equal or exceed a listed impairment," then "the ALJ must

assess the claimant's residual functional capacity ('RFC')."

Id. at 179.²

Step four then requires the ALJ to assess whether, based on that RFC, the claimant can "perform past relevant work"; if so, the claimant does not qualify as disabled. See id. at 179-80. However, if the claimant establishes an inability to return to prior work, the analysis proceeds to the fifth step, which "requires the [Government] to prove that a significant number of jobs exist which the claimant could perform, despite [the claimant's] impairments." Hines, 453 F.3d at 563. In making this determination, the ALJ must decide "whether the claimant is able to perform other work considering both [the claimant's RFC] and [the claimant's] vocational capabilities (age, education, and past work experience) to adjust to a new job." Hall, 658 F.2d at 264-65. If, at this step, the Government cannot carry its "evidentiary burden of proving that [the claimant] remains

² "RFC is a measurement of the most a claimant can do despite [the claimant's] limitations." Hines, 453 F.3d at 562 (citation omitted). The RFC includes both a "physical exertional or strength limitation" that assesses the claimant's "ability to do sedentary, light, medium, heavy, or very heavy work," as well as "nonexertional limitations (mental, sensory, or skin impairments)." See Hall, 658 F.2d at 265. "RFC is to be determined by the ALJ only after [the ALJ] considers all relevant evidence of a claimant's impairments and any related symptoms (e.g., pain)." Hines, 453 F.3d at 562-63 (citation omitted).

able to work other jobs available in the community," the claimant qualifies as disabled. See Hines, 453 F.3d at 567.³

III. ANALYSIS

Plaintiff first asserts that the ALJ's credibility analysis is not supported by substantial evidence. (Plaintiff's Memorandum in Support of Motion for Judgment on the Pleadings (Doc. 12) at 1, 4-7.) Plaintiff's second contention is that the ALJ erred in his evaluation of the medical evidence and opinions. (Id. at 1, 7-8.)

Moreover, upon review of the ALJ's decision, it appeared to this court that the recent ruling of the United States Court of Appeals for the Fourth Circuit in Mascio v. Colvin, 780 F.3d 632 (4th Cir. 2015), may be applicable. Consequently, the court afforded the parties an opportunity to brief the impact, if any, of Mascio on the ALJ's decision. (Order (Doc. 16) at 1-3.) The court has received and reviewed the parties' supplemental briefing, (see Docs. 17, 18), the entire record, and all additional pleadings. For the reasons explained below, remand is in order.

³ A claimant thus can qualify as disabled via two paths through the five-step sequential evaluation process. The first path requires resolution of the questions at steps one, two, and three in the claimant's favor, whereas, on the second path, the claimant must prevail at steps one, two, four, and five. See Mascio v. Colvin, 780 F.3d 632, 634-35 (4th Cir. 2015).

A. Credibility

Regarding credibility, Craig v. Chater, 76 F.3d 585 (4th Cir. 1996), outlines the two-part test for evaluating a claimant's statements about symptoms. "First, there must be objective medical evidence showing 'the existence of a medical impairment(s) which results from anatomical, physiological, or psychological abnormalities and which could reasonably be expected to produce the pain or other symptoms alleged.'" Craig, 76 F.3d at 594 (citing 20 C.F.R. §§ 416.929(b), 404.1529(b)) (other citation omitted). If the ALJ determines that such an impairment exists, the second part of the test then requires him to consider all available evidence, including the claimant's statements about pain, in order to determine whether the claimant is disabled. Id. at 595-96 (describing that, if the threshold step is met, then "the intensity and persistence of the claimant's pain, and the extent to which it affects her ability to work, must be evaluated" (citations omitted)). While the ALJ must consider a claimant's statements and other subjective evidence at step two, he need not credit them insofar as they conflict with the objective medical evidence or to the extent that the underlying impairment could not reasonably be expected to cause the symptoms alleged. See id. at 595. Where the ALJ has considered the relevant factors and heard the claimant's testimony and observed his demeanor, the ALJ's

credibility determination is entitled to deference. See Shively v. Heckler, 739 F.2d 987, 989-90 (4th Cir. 1984) ("Because he had the opportunity to observe the demeanor and to determine the credibility of the claimant, the ALJ's observations concerning these questions are to be given great weight." (citation omitted)).

Here, the ALJ completed the two-step Craig analysis, but he committed error at step two. First, the ALJ stated that he had "careful[ly] consider[ed]" the evidence and found that Plaintiff's "medically determinable impairments could reasonably be expected to cause the alleged symptoms[.]" (Tr. at 14-15.) The ALJ therefore discharged his duty under the first step of the Craig analysis.

The ALJ's error, however, arises under the Fourth Circuit's Mascio decision. Specifically, in Mascio, the Fourth Circuit found that an ALJ erred by using, at part two of the credibility assessment, "boilerplate" language that "the claimant's statements concerning the intensity, persistence and limiting effects of [his pain] are not credible to the extent they are inconsistent with the above residual functional capacity assessment." 780 F.3d at 639 (citation omitted). This method "'gets things backwards' by implying 'that ability to work is determined first and is then used to determine the claimant's credibility.'" Id. (quoting Bjornson v. Astrue, 671 F.3d 640,

645 (7th Cir. 2012)). Instead, "the ALJ here should have compared [the claimant's] alleged functional limitations from pain to the other evidence in the record, not to [the claimant's] residual functional capacity." Id.

Similarly, the ALJ clearly erred at step two of the Craig analysis in the instant case by considering the credibility of Plaintiff's testimony through the use of the same objectionable comparison to the RFC that was found improper in Mascio. Specifically, the ALJ found that Plaintiff's "medically determinable impairments could reasonably be expected to cause the alleged symptoms; however, the claimant's statements concerning the intensity, persistence and limiting effects of these symptoms are not credible to the extent they are inconsistent with the above residual functional capacity assessment." (Tr. at 15.) The question thus becomes whether this error is harmless.

Mascio is also instructive on the harmless issue. In Mascio, the Fourth Circuit explained what harmless error would look like in these circumstances, stating: "The ALJ's error would be harmless if he properly analyzed credibility elsewhere." 780 F.3d at 639. The Fourth Circuit clarified that an ALJ discharges this obligation when he "explain[s] how he decided which of [the claimant's] statements to believe and which to discredit." See id. at 640. In Mascio, the ALJ failed

to explain himself accordingly, beyond "the vague (and circular) boilerplate statement that he did not believe any claims of limitations beyond what he found when considering [the claimant's] residual functional capacity." Id. The "lack of an explanation require[d] remand." Id.

Therefore, per Mascio, the relevant harmlessness question now becomes whether the ALJ explained how he decided which of the claimant's statements to believe and which to discredit. This court concludes that the ALJ failed in this regard and remand is therefore in order.

More specifically, in this case, the ALJ's credibility analysis summarizes much, but not all, of Plaintiff's testimony. (See Tr. at 15.) By way of example,⁴ the ALJ did not mention in his decision Plaintiff's testimony that she could only sit or stand for "a few minutes" before experiencing back spasms "like . . . a vice" that forced her to lie down. (See Tr. at 15, 33-34, 43-44.) Consequently, given this selective recitation of Plaintiff's testimony, it is far from clear if the ALJ considered all of Plaintiff's hearing testimony.

The court is well aware that, in most cases, a statement by the ALJ that he considered all of the evidence is sufficient to demonstrate that the ALJ considered the entire record. See,

⁴ The examples the court provides herein are not exhaustive.

e.g., Grubby v. Astrue, No. 1:09cv364, 2010 WL 5553677, at *6 (W.D.N.C. Nov. 18, 2010) (citing Rappaport v. Sullivan, 942 F.2d 1320, 1323 (8th Cir. 1991)) (concluding that, because the ALJ stated that he considered the entire record in making his decision, the court could reject the claim that the claimant's testimony and associated report were not considered). The court notes too that here the ALJ said he considered the entire record, which includes Plaintiff's testimony. (Tr. at 11, 14-15.) Nevertheless, given the ALJ's use of the objectionable boilerplate, his selective recitation of Plaintiff's testimony, and, as described below, his tacit adoption of some (but not all) of that testimony, the court cannot adequately review the ALJ's credibility analysis. See Radford v. Colvin, 734 F.3d 288, 295 (4th Cir. 2013) ("A necessary predicate to engaging in substantial evidence review is a record of the basis for the ALJ's ruling." (citation omitted)); see also Lopez ex rel. Lopez v. Barnhart, 336 F.3d 535, 539 (7th Cir. 2003) (concluding that an ALJ is required to build an "accurate and logical bridge" between the evidence and his conclusions (citation omitted)).

More specifically, the ALJ seems to credit some of Plaintiff's testimony while discounting other testimony, all without explanation. For example, Plaintiff testified that she could not lift her arm out in front of her body without shoulder pain, (Tr. at 32), and the ALJ appears to have at least

partially credited this testimony because he limited her to only occasional overheard reaching, (Tr. at 14). However, Plaintiff also testified that she could not "pick up a gallon of milk," (id. at 32), but the ALJ concluded that she could perform light work, which involves the frequent lifting or carrying of objects weighing up to ten pounds, but in any event lifting no more than twenty pounds at a time, (id. at 14); see 20 C.F.R.

§§ 404.1567(b), 416.967(b). Likewise, as mentioned above, Plaintiff testified that she could only sit or stand for a few minutes at a time before experiencing back spasms requiring her to lie down, (Tr. at 33-34, 43-44), however, the ALJ never included, or explained why he would not include, a sit/stand limitation in Plaintiff's RFC, (id. at 14-17).

Whether Plaintiff requires a sit/stand option is important. Though the ALJ did not include one in Plaintiff's RFC determination, he did inquire about what impact the presence of a sit/stand option could have. For example, in a hypothetical that the ALJ presented to the VE, he included a limitation to a sit/stand option and then asked if it would "change any of the [job] samplings . . . provided." (Id. at 51.) The VE responded:

Your Honor, possibly. There is going to be some loss of efficiency when somebody has to change positions. But, if you can be in one position or the other and alternate say for every hour or so, I don't think there's going to be any impact. If you get down to having to

change positions every 45 minutes, you'll probably lose about a third of these jobs. If you go much below alternating every 30 minutes, then it starts to become a problem. And, certainly, if anybody has to change positions every 15 minutes or so, or if either one of the alter [sic] needed positions is for about 15 minutes and an aggregate those periods add up to around two hours, I don't think you can work on a sustained basis. Two hours out of an eight-hour day.

(Id.; see id. at 52-53.) Consequently, the question of whether to credit or discredit Plaintiff's testimony on this issue may have a very real outcome on her disability determination. The court therefore concludes that the ALJ's credibility analysis is incomplete and not subject to review in the present form and therefore this error is not harmless.⁵

⁵ See, e.g., Jones v. Colvin, No. 4:14-CV-00200-RN, 2015 WL 4773542, at *9 (E.D.N.C. Aug. 13, 2015) ("Having failed to properly and thoroughly analyze Jones's credibility, ALJ Allen failed to cure any issue created from the use of problematic boilerplate language criticized in Mascio."); Carver v. Colvin, No. 1:13CV13, 2015 WL 4077466, at *10-12 (M.D.N.C. July 6, 2015) (recommending remand where the ALJ failed to articulate meaningful reasons beyond the objectionable boilerplate language); Roxin v. Comm'r, Soc. Sec. Admin., Civil No. SAG-14-2311, 2015 WL 3616889, at *3 (D. Md. June 5, 2015) (remanding where use of objectionable boilerplate language was deemed prejudicial because "the ALJ's ensuing credibility analysis does not make clear the reasons for the adverse determination"); Thrasher v. Colvin, No. 7:13-CV-245-FL, 2015 WL 1431702, at *3-4 (E.D.N.C. Mar. 27, 2015) (remanding where use of objectionable boilerplate language and subsequent credibility analysis rendered it unclear why the ALJ credited some of the plaintiff's testimonial statements, but discounted others); Wright v. Colvin, No. 5:13-CV-686-D, 2015 WL 1275397, at *2 (E.D.N.C. Mar. 19, 2015) (remanding for further proceedings where the ALJ used the objectionable boilerplate language and failed to explain otherwise why he credited some and disregarded other portions of the plaintiff's testimony).

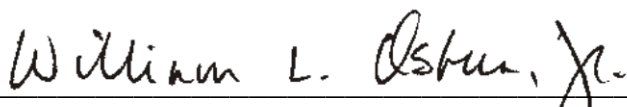
IV. CONCLUSION

In sum, on remand the Commissioner should conduct a proper analysis in light of the principles articulated in Mascio. The court expresses no opinion regarding whether Plaintiff is disabled under the Act and the court declines to consider the additional issues raised at this time. Hancock v. Barnhart, 206 F. Supp. 2d 757, 763-764 n.3 (W.D. Va. 2002) (on remand, the ALJ's prior decision has no preclusive effect, as it is vacated and the new hearing is conducted de novo).

IT IS THEREFORE ORDERED that the Commissioner's Decision finding no disability is **VACATED**, and that the matter is **REMANDED** to the Commissioner under sentence four of 42 U.S.C. § 405(g). The Commissioner is directed to remand the matter to the ALJ for further proceedings consistent with this order. To this extent, the Commissioner's Motion for Judgment on the Pleadings (Doc. 13) is **DENIED**, and Plaintiff's Motion for Judgment on the Pleadings (Doc. 11) is **GRANTED**. To the extent that Plaintiff's motion seeks an immediate award of benefits, it is **DENIED**.

A judgment consistent with this Memorandum Opinion and Order will be entered contemporaneously herewith.

This the 4th day of August, 2016.


United States District Judge